

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A CONDITIONAL
USE PERMIT GRANTED TO HOWARD
MOE BY GRAYS HARBOR COUNTY AND
DENIED BY THE DEPARTMENT OF
ECOLOGY

SHB No. 78-15

HOWARD I. MOE (Little Hoquiam
Boat Shop) and GRAYS HARBOR
COUNTY,

ORDER OF REMAND

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

A "Motion for Summary Judgment" in the above matter by respondent Department of Ecology came on for hearing before the Shorelines Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, David A. Akana, Robert E. Beaty, and Rodney Proctor, Members, on August 7, 1978 in Lacey, Washington. Hearing examiner William A. Harrison presided.

Appellant Howard I. Moe was represented by his attorney Stanley J.

1 Krause. Appellant Grays Harbor County was represented by Douglas C.
2 Lewis, Deputy Prosecutor. Respondent, Department of Ecology was
3 represented by Robert V. Jensen, Assistant Attorney General.

4 Department of Ecology made timely "Motion for Summary Judgment" on
5 two distinct grounds: (1) that appellant Grays Harbor County failed to
6 comply with WAC 197-10-340 governing threshold determinations under the
7 State Environmental Policy Act of 1971 (SEPA), 43.21C RCW and (2) that
8 appellant's negative threshold determination was clearly erroneous.

9 Having heard the oral argument of counsel and having considered the
10 following affidavits and exhibits placed before it:

11 A. Affidavits of Robert V. Jensen dated July 24, 1978 and
12 July 28, 1978.

13 B. Affidavit of Pete Haskin dated August 4, 1978.

14 C. Affidavit of Howard I. Moe dated August 3, 1978.

15 D. Affidavit of Omar Youmans dated August 3, 1978.

16 E. Affidavit of Tom Mark dated August 4, 1978.

17 F. Exhibits referred to within the above Affidavits.

18 and being fully advised, the Shorelines Hearings Board makes these

19 FINDINGS OF FACT

20 I

21 Appellant Howard I. Moe, made application to Grays Harbor County
22 for a shoreline conditional use permit for a substantial development
23 under 90.58 RCW in February, 1978. The proposed development consisted
24 of placing fill and constructing a boat shop within a 24-acre site.

25 II

26 Appellant Grays Harbor County as lead agency for this proposal,

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1 issued a final Declaration of Non-Significance under SEPA, 43.21C RCW,
2 on March 30, 1978; and, on the same date, granted the Moe application
3 for a shoreline conditional use permit for a substantial development.
4 The Declaration of Non-Significance was sent to the Department of
5 Ecology after, not before, Grays Harbor County granted the shoreline
6 permit. This fact was not in issue.

7 III

8 Department of Ecology denied the shoreline conditional use permit for
9 a substantial development on May 3, 1978. Appellants requested that the
10 Shorelines Hearings Board review this denial. The present motion of
11 Department of Ecology is made within that proceeding now before us.

12 IV

13 Any Finding of Fact which should be deemed a Conclusion of Law is
14 hereby adopted as such.

15 From these Findings, the Board makes these

16 CONCLUSIONS OF LAW

17 I

18 The rules implementing the State Environmental Policy Act provide,
19 at WAC 197-10-340:

20 . . .

21 (2) The lead agency shall prepare a final declara-
22 tion of nonsignificance for all proposals except
for those listed in subsection (3) below.

23 (3) A lead agency making a threshold determination
24 of nonsignificance for any of the following pro-
25 posals shall prepare a proposed declaration of
nonsignificance, and comply with the requirements
of subsection (4) through (7) below prior to
taking any further action on the proposal;

6

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1 (a) Proposals which have another agency with
2 jurisdiction, except that agencies may specify
3 in their own agency SEPA guidelines specific
4 situations in which written concurrence may be
5 obtained from the other agency or agencies with
6 jurisdiction and the proposed declaration of
7 nonsignificance omitted and a final declaration
8 of nonsignificance issued.

9

10 (4) The lead agency shall issue all proposed
11 declarations of nonsignificance by sending the
12 proposed declaration and environmental checklist
13 to other agencies with jurisdiction.

14 (5) Any person or agency may submit written
15 comments on the proposed declaration of nonsigni-
16 ficance to the lead agency within fifteen days
17 from the date of its issuance. The lead agency
18 shall take no further action on the proposal,
19 which is the subject of the proposed declaration
20 of nonsignificance, for fifteen days from the
21 date of issuance. If comments are received, the
22 lead agency shall reconsider its proposed declara-
23 tion; however, the lead agency is not required
24 to modify its proposed declaration of nonsigni-
25 ficance to reflect the comments received.

26 (6) After the fifteen day time period, and after
27 considering any comments, the lead agency shall
adopt its proposed declaration as a "Final
Declaration of Nonsignificance," determine that
the proposal is significant, or utilize the
additional information gathering mechanisms of
WAC 197-10-330(1).

These rules further provide at WAC 197-10-040(4):

Agency with jurisdiction means an agency from which
a nonexempt license is required for a proposal or
any part thereof, which will act upon an application
for a grant or loan for a proposal, or which
proposes or initiates any governmental action of a
project of non-project nature.

II

The Department of Ecology is an agency with jurisdiction under the

1 above definition, WAC 197-10-040(4), since it must make the final
2 decision on any shoreline permit for a conditional use. RCW 90.58.140(12).
3 Appellant, Grays Harbor County, did not comply with the applicable provi-
4 sions of WAC 197-10-340 as it failed to issue a proposed declaration of
5 nonsignificance and to thereby provide the Department of Ecology, an
6 agency with jurisdiction, with the mandatory fifteen day period in which
7 to file written comments prior to acting on the shoreline permit. The
8 consequence of this failure by Grays Harbor County was both to prevent
9 reception of Department of Ecology's comments and, further, to prevent
10 Department of Ecology, if it disagreed with the finding of nonsignificance,
11 from assuming lead agency status under WAC 197-10-345, which may only be
12 accomplished within this fifteen day period. By assuming lead agency
13 status, Department of Ecology would then be entitled to assume respon-
14 sibility for the preparation of an environmental impact statement.

15 For these reasons, the Grays Harbor County's approval of the
16 subject shoreline conditional use permit for a substantial development
17 should be reversed and remanded for full compliance with the provisions
18 of WAC 197-10-340. Nothing herein establishes that there are not other
19 agencies with jurisdiction in addition to the Department of Ecology,
20 under the definition of such agencies appearing at WAC 197-10-040(4)
21 cited above.

22 III

23 Because of our conclusion that WAC 197-10-340 was violated, we do not
24 reach the question of whether the declaration of nonsignificance issued
25 by Grays Harbor County was clearly erroneous.

IV

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Conclusions the Board enters this


ORDER

Grays Harbor County's approval of the shoreline conditional use permit for a substantial development in this matter is hereby reversed and remanded.

DONE at Lacey, Washington this 15TH day of August, 1978.


SHORELINES HEARINGS BOARD


DAVE J. MOONEY, Chairman


CHRIS SMITH, Member


DAVID A. AKANA, Member


ROBERT E. BEATY, Member


RODNEY S. PROCTOR, Member